

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of General Sessions
Court of Common Pleas

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S.C. Supreme Court

Dianne S. Goodstein, Circuit Court Judge
(Trial)
Deandrea G. Benjamin, Circuit Court Judge
(PCR)

Case No. 2011-CP-18-1497

Tiffany Sanders, Petitioner,

vs.

State of South Carolina Respondent,

AMENDED PETITION FOR WRIT OF CERTIORARI

December 27, 2013

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STATEMENT OF ISSUES ON APPEAL

APPEAL FROM JUDGE DIANNE GOODSTEIN

(Trial judge)

(filed separately as Appellant's Brief as direct appeal)

- I. Did the trial judge award fail to direct a verdict of acquittal when there was no evidence to establish the necessary elements for the crime of murder? (filed separately as direct appeal)
- II. Did the trial judge err in failing to instruct the jury that the killer's malice cannot be transferred to the appellant without some evidence that the appellant demonstrated malice? (filed separately as direct appeal)

APPEAL FROM JUDGE DEANDRE G. BENJAMIN

(Denial of Relief from PCR judge)

ARGUMENTS

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STATEMENT OF THE CASE¹

(TRIAL)

On June 8, 2007, Sean Kammerer shot and killed Jessie Ham in the Publix/Tire Kingdom parking lot on Dorchester Road in Dorchester County, South Carolina. On June 26, 2007, the Dorchester County Sheriff's Department arrested the appellant and charged her with the crime of accessory before the fact of murder on the theory that she drove the victim to the scene at the request of the shooter, Sean Kammerer. Thereafter, on September 8, 2008, the Dorchester Grand Jury indicted the appellant for this charge. See Appendix at page 1 for Indictment Number 2007-GS-18-1206. For reasons that are not clear in the record, almost two years later, the Dorchester County Grand Jury indicted the appellant for murder on May 6, 2010, at Indictment number 2010-GS-18-707. (Appendix at page 3) Presumably, the State increased the charge because the appellant would not plea to the 2007 charge to accessory. 88 days after being indicted for murder, the appellant appeared before Judge Goodstein and a jury on August 3, 2010, for trial on both charges. She entered a plea of not guilty to each charge, waived arraignment on the new charge of murder, and the Court of General Sessions tried her on both charges. The State called seven witnesses as follows:

1. Detective David Watson (North Charleston Police Officer)
2. Kevin King (Jessie Ham's friend who rode to scene of the shooting in back seat of Tiffany Sander's Honda and who sat behind Jessie Ham)
3. David Hughey (Jessie Ham's friend who rode to scene after the shooting on bicycle while carrying a gun)

¹ This statement of case is the statement of case from the petitioner's direct appeal. The petitioner includes it here because it is hard to make sense of the statement of case from the P.C.R. appeal without this factual background.

4. Brandon Frye (Jessie Ham's friend who rode to scene on bicycle with David Hughey)

5. Jessica Hans (North Charleston Police Officer, formerly Publix employee, who witnessed the shooting)

6. DeJuan Jenkins (driver of Sean Kammerer's Jeep Cherokee who drove Sean Kammerer to the scene of the shooting—the Jeep belong to Sean's mother, and the witness testified he was driving it because Sean lost his driver's license.)

7. James Sturkie (North Charleston Police Detective)

The appellant did not testify, but the parties stipulated to the introduction of her uncounseled, written statement given on June 9, 2007. (See page ___ Record on Appeal for her written statement—trial transcript is included in the record on appeal in direct appeal being filed simultaneously.)

In addition to these seven witnesses, the parties stipulated that on June 8, 2007, the defendant, Sean Kammerer, shot and killed Jessie Hamm by shooting him three times in the back and one time in the neck. (See page ___ [tr. 67] of R.O.A. for stipulations and page ___ of the R.O.A. for the written stipulation.) The Defendant, after colloquy with the Court, declined to testify, and the defendant called no witnesses. R.O.A. page ___[tr. Page 230] On August 5, 2010, after requesting that the Court replay the testimony of the eyewitness, Jessica Hans (the Publix employee, later N. Charleston police officer), and Kevin King (Jessie Ham's friend who rode with him to the scene) and for clarification of the court's instruction on "intent and malice" and thereafter the definition of "principal," the jury returned a verdict of not guilty on the charge of accessory before the fact of murder and a verdict of guilty on the charge of murder. The Court sentenced the appellant to 30 years in

prison, giving credit for time served in pre-trial detention. See Record on Appeal page ___[tr. Pages ___[tr. Page 314] and sentencing sheet. (Appendix page 17)

STATEMENT OF THE CASE
(POST-CONVICTION RELIEF)

Following the Court's sentencing on August 5, 2010, the appellant did not appeal her conviction. On August 3, 2011, petitioner filed a *pro se* application for post-conviction relief. On August 18, 2011, she filed an amended application for post-conviction relief, alleging that her trial counsel failed to notify her of her right to appeal, failed to call witnesses at trial, the shooter, Sean Kammerer or her sister, Amanda Fender, and failed to follow up on a cross examination of Jessica Hans, confirming the fact that the appellant was not present at the scene. (Appendix, page 5) One of the grounds for relief was that the petitioner's trial counsel failed to advise her of her right to appeal. On May 24, 2012, the Honorable Deandrea G. Benjamin heard the appellant's post-conviction relief. On July 27th, Judge Benjamin issued a written order, denying the appellant's claim for post-conviction relief, but granting her leave of court to file a direct appeal of her conviction on the ground that her counsel failed to advise her of her right to an appeal. Judge Benjamin's order is in the Appendix at page 18. Therefore, since the trial court granted the petitioner the right to a direct appeal, she does not address that separate ground in detail. The issues raised in the direct appeal are addressed in petitioner's separate brief filed simultaneously with this petition for *certiorari*.

On August 28, 2012, the appellant filed her notice of intent to appeal.

Introduction/Standard of Review

The VI Amendment to the U. S. Constitution and Article I § 14 of the State Constitution guarantee to every criminal defendant the right to be represented by a competent lawyer and receive a vigorous defense. There is a well-developed body of law in the federal circuits and South Carolina that require lawyers to present a competent defense, and when a lawyer fails to act in a competent manner and his or her representation falls below an objective standard, then the defendant is denied a constitutional right to counsel. See, for example, *Sosebee v. Leeke*, 293 S.C. 531, 362 S.E.2d 22 (1987), where the Supreme Court found that a lawyer's performance was so deficient as to prevent the defendant from receiving a fair trial when the trial lawyer failed to object to the trial judge's comments on the credibility of witnesses. "The comments unfairly prejudiced petitioner. The compounding of that prejudiced by counsel's failure to object was an error so serious as to deprive Petitioner of a fair trial." *Sosebee* at page 24.

The standard for judging the performance of counsel is what is reasonable under prevailing norms:

"The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674, 636 (1984). The second prong of the *Strickland* test requires a showing that trial counsel's deficient performance so prejudiced the defense "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 693.

Sosebee v. Leeke, 293 S.C. 531, 362 S.E.2d 22 (1987)

Here, the deficiencies were far greater and more material than a failure to object to a trial judge's comments.

Argument I.

The Court of Common Pleas correctly granted the Petitioner the right to a direct appeal when she found that the Petitioner's trial counsel gave her no meaningful information about her right to appeal.

The lower court correctly concluded that the Petitioner knew practically nothing about her right to appeal. At the P.C.R. hearing below, trial counsel admitted that he did not give her any meaningful information about her right to appeal. He did not tell her how long she had, what was involved. In fact, the only thing he told her was that she had no grounds for an appeal:

I suppose I should have told you [Sanders], you have a right to appeal, you have to do it in 10 days, you should probably—I should probably file an appeal and order the transcript. I should have told her all about that, but I was in shock, too, and I basically told her, you've got no right to appeal. You have no grounds for appeal.

Appendix, Volume I, pages 104-105

The Petitioner testified that after the trial, she never heard from her lawyer again, and even though she testified the trial judge mentioned something about the right to appeal, such a colloquy, if it happened, does not appear in the record below. See Petitioner's testimony at pages 42-43 of the Appendix (Volume I):

Q. Now, after you were convicted and sentenced that day, did he [counsel] talk to you about filing an appeal?

A. No, sir, not to me. After that, I didn't hear anything from him.

Q. Okay. That day?

A. That day or afterwards.

Q. Or afterwards?

A. No, sir.

Q. Did you contact him?

A. No, sir.

Q. All right. So you had not talked to him from that point on about your conviction, your sentence or whether or not—

A. No, sir. He told my family that he was supposed to come visit or he was supposed to write, but he never came.

Q. So you haven't spoken to him about an appeal?

A. No, sir.

Q. Did anyone from the bench or anyone from the court system explain to you that you had a right to appeal your conviction and sentence?

A. The judge did.

Q. The judge—when?

A. After I was convicted.

Q. And what did the judge tell you?

A. She said we that the right to appeal her decision.

Q. All right. But you didn't know how to do that?

A. No, sir.

Q. You didn't know how much time you had?

A. Correct.

Q. You didn't know what forms to file?

A. Correct.

Thus, the record conclusively demonstrates that the Petitioner received no meaningful information about a right to appeal, and she could not have “knowingly” or “voluntarily” waived her right to appeal. Knowingly means “with knowledge” or “consciously. Likewise, voluntarily means “done by design or intention.” *Black’s Law Dictionary*, 5th Edition. Since the evidence is overwhelming that the Petitioner had no information or incorrect information, the lower court did not err in granting the Petitioner the right to a direct appeal.

Argument II

The Court of Common Pleas erred in failing to grant the appellant a new trial when the overwhelming evidence demonstrates that her trial counsel deviated from the minimum standard of care by failing to interview or call material witnesses, which prevented the petitioner from receiving effective assistance of counsel.

A.

Trial Counsel Did Not Interview Witnesses.

To prevail in a PCR action, an applicant must satisfy a two prong test: he must first show her counsel’s performance fell below an objective standard of reasonableness, and he is then required to prove he suffered prejudice as a result of counsel’s deficient performance. *Franklin v. Catoe*, 346 S.C. 563, 570-71, 552 S.E.2d 718, 722-23 (2001) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). “However, there is a strong presumption that counsel rendered adequate assistance and exercised reasonable

professional judgment in making all significant decisions in the case.” *Edwards v. State*, 392 449, 456, 710 S.E.2d 60, 64 (2011) (internal quotation omitted) *Sigmon v. State*, ___ S.C. ___, ___ S.E.2d ___ (Opinion No. 27233, filed March 20, 2013).

As the transcript of the trial demonstrates, the State indicted the appellant for the charge of accessory before the fact of murder on September 8, 2008.² On May 6, 2010, the State indicted the appellant for the charge of murder and called the case for trial 88 days later on August 3, 2010. (See pages 13 and 15 Appendix for the indictments.) As discussed above, the State called seven witnesses, three police officers and four eyewitnesses. The appellant elected not to testify and entered her June 27, 2010, written statement in to evidence. (See R.O.A. filed simultaneously in the direct appeal at page ___ for the written statement.) The State did not call Sean Kammerer who previously plead guilty to murder and who was in state custody at the time of appellant’s trial. Appellant’s trial counsel counted on the State calling Kammerer and was surprised when the State did not do so. If this were the only strategic error committed by counsel, this matter would not rise to the level of ineffective assistance of counsel. However, the appellant’s counsel **never interviewed or attempted to interview Kammerer**, and this is one critical failure that deprived the appellant of effective representation:

Q. And what did you do to investigate the charges and any defenses?

A. The trial came up. I figured the government, the state was going to bring him [Kammerer] to trial. I kind of was counting on that. I told my client that. We showed up for trial, he wasn’t there, and I can just tell you right now that after the trial was over I

² The petitioner’s direct appeal is filed simultaneously with this petition for certiorari. Therefore, the petitioner makes reference to the Appendix and the separate record on appeal.

realized that I should have gone to see him in jail. I should have found out what he was going to say and I should have brought him down there. I did, in my closing argument, try to put it on the state, that if he was going to help their case they would have brought him, but I guess, I could tell looking in the jury's eyes that they weren't buying it. They figured I could have got him there just as easily as they could.

Appendix page 95 [tr. Page 66])

This statement is an admission of a deviation from the objective standard governing the representation of a criminal defendant. While the State can argue that it may be a plausible strategy not to call Kammerer as a witness, it is an undeniable deviation from the minimum standard of competent representation to avoid discovering what he had to say. No lawyer can adopt a "strategy" if he does not know what is included or excluded in the strategy. Another way of saying the same thing is to say that no one can make a strategy decision without knowing what potential elements are available. The lower court erred in justifying the departure from the minimum effective standard holding: "The applicant did not present Kammerer at the post-conviction relief hearing or properly establish his testimony in accordance with the rules of evidence." (Order under review at page 5, page 22 of the Appendix.) This analysis misses the point. The undisputed point is that the applicant's trial counsel never interviewed the witness. This is far different from failing to call the witness, which might have been a strategy decision if counsel had interviewed him. By the time of the P.C.R. hearing, the opportunity was lost. As counsel explained to the court, the petitioner was denied the opportunity to call Mr. Kammerer because of his application for post-conviction relief:

MS. ELLIOTT: Your Honor, I object. This is going to be based on hearsay. He's not here. He could have been brought into court to testify. We do not have the opportunity to cross-examine him and tremendously object to anything related to Mr. Kammerer from this witness.

MR. COBB: Well, unfortunately, Your Honor, he is pending a post-conviction relief, and is waiting to have counsel appointed and obviously could not be summoned as a witness.

Appendix at page 88 [transcript page 59])

Thus, the appellant suffered prejudice at the time of trial because when appellant's counsel conceded that he never interviewed the most critical witness to his defense, he conceded falling below an objective standard of competency. The failure to attempt to interview Kammerer is a critical deviation from the minimum standard of care that directly prejudiced the petitioner and denied her a fair trial. As the lower court noted in the Order under review: "Where counsel articulates a valid reason for employing a certain trial strategy, such conduct will not be deemed ineffective assistance of counsel. *Watson v. State*, 370 S.C. 68, 634 S.E.2d 642 (2006). Second counsel's deficient performance must have prejudiced the Applicant such that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. Where counsel articulates a valid reason for employing a particular trial strategy, counsel's conduct will not be determined ineffective assistance of counsel. *Simpson v.*

Moore, 367 S.C. 587, 627 S.E.2d 701 (2006). This Court finds that all allegations with the exception of the appeal to be without merit and are denied and dismissed as set forth below.” (Order at page 4, Appendix at page 21) It is one thing to make a strategic trial decision not to call a witness, but it is quite a different thing to neglect to interview him, thus preventing any meaningful analysis of such a decision. This failure is alone sufficiently prejudicial to deprive the appellant of any hope of a fair trial, and especially so when the failure is combined with the failure to call an available witness in the courtroom, Amanda Fender.

As the trial transcript in the record on appeal establishes, Jessica Hans, the Publix employee who later became a North Charleston police officer, witnessed the shooting. At the time of the shooting, she worked at Publix and saw the murder as she left work. Her testimony is contained in the trial transcript filed in the direct appeal Record on Appeal at page ____ [transcript page 195] as follows:

A. Yes, sir. After I walked to my car, another employee and I stood in the parking lot for a few minutes. We were talking about work and other things. Some point between 11 and 12, I'm not sure the exact time, we heard several loud pops. I thought they might have been fireworks. I'm not 100 percent positive. But at some point my attention was drawn across the parking lot to the Papa John's/Tire Kingdom area, which is on the other side, which is where I actually continued to see a person standing—standing pointing at the ground.

Eventually he actually fired a gun. There was another shot, I'm not sure if it was one or two, fired another shot. There was another person that was

standing with that person that ran between the two buildings, because Publix is separate from Papa John's and Tire Kingdom.

After that shot was fired, the person who actually held the gun in their hand ran to the other side of Tire Kingdom, which was even further away. They disappeared behind the side of the building between Tire Kingdom and the woods.

About 30 seconds later, a Jeep Cherokee pulled out from the side of the building, pulled out through the parking lot and turns left onto the little side street that is between the parking lot and the other restaurants that are right there; and sped off in the direction opposite from where we were in the parking lot.

(emphasis added)

It is undisputed that DeJuan Jenkins drove the Jeep Cherokee while the shooter, Sean Kammerer was the passenger. In fact, this car belonged to the Kammerer family, and DeJuan Jenkins testified he was driving only because Sean Kammerer lost his driver's license. Officer Hans testified no one else was present, which was consistent with all the other testimony. Thus, the jury's murder conviction is based on nothing more than the jury's speculation that the petitioner was involved in a scheme to murder only because she drove the victim to the scene of the crime, and thus the failure to interview or call the shooter to the stand and examine him was critical. Even if the shooter's testimony would be unfavorable, the petitioner's counsel neglected to interview him to learn what his testimony would be and thus had no basis to form any

strategy. This is a failure that is indisputably prejudicial to the petitioner's case. Not one witness had any direct evidence of a conspiracy to commit murder. The closest evidence was a police officer's statement that he "heard" from an undisclosed declarant that Tiffany Sanders was Sean Kammerer's girlfriend. See the direct appeal Record on Appeal at page ____ [tr. page 217]). Astonishingly, the petitioner's attorney did not object to this hearsay statement, which Officer Sturkie recited in the passive voice as "it was said" that Tiffany was romantically linked to the shooter. A more damaging unchallenged statement cannot be imagined, which further supports the deficient performance of trial counsel who fell below any professional objective standard.

Since Sean Kammerer is one of the two witnesses who can exonerate the petitioner, there was no excuse for the petitioner's lawyer to fail to contact him and discover exactly what his testimony would be. This critical failure deprived the petitioner of a substantial chance to mount an effective defense, and she has been prejudiced by being sentenced to 30 years in prison in spite of the fact that not one witness puts her at the scene at the time of the murder.

B. Trial Counsel Did Not Call Available Witnesses In The Courtroom

As the record demonstrates, there were six people at the scene of the crime before the shooting: Sean Kammerer and his driver, Dejuan Jenkins arrived in the Kammerer's Jeep Cherokee. The appellant drove her Honda automobile to the scene accompanied by the victim, Jesse Ham, his friend, Kevin King, and her sister, Amanda

Fender. In the hours leading up to the shooting and in the hours following the shooting, Amanda accompanied the petitioner at every moment. She was there when the two of them initially came upon the four boys at around 7:00 p.m. She was there when the appellant drove back to Brandon's house and spoke to Brandon and David Hughey in Brandon's front yard. She was there when Kevin King and Jessie Hamm later joined them. She was there when the four—Tiffany, Amanda, Kevin and Jessie—drove to Publix/Tire Kingdom, and she was there when appellant left the scene without the two boys. She saw and heard everything, and she was in the courtroom available to testify. She has no criminal record, and she witnessed all of the events involving her sister on the night of the event. At the hearing before the P.C.R. judge on May 24, 2012, she testified that the four boys stopped them, not the other way around:

A. Well, we went to grab something to eat because our parents went out for their anniversary, and then we were riding around the neighborhood, and we got stopped by these guys walking and they said, come on to our house.

Q. Okay.

A. So when we got there they asked me, they all asked me if I could go get them some beer, and I told them no, because they were underage. They also asked me if I knew where I could get them any marijuana. I was, like, I don't do that kind of stuff. So I don't – I couldn't help. I told them I wouldn't—no.

Q. Okay. And--

A. Because they were drinking that night and—

Q. And did you ultimately end up at somebody named Brandon's house?

A. Yes, sir.

Q. Were there some people there shooting baskets, playing basketball?

A. Yes, sir, and they were drinking, but me and my sister didn't drink anything.

Q. You weren't drinking?

A. No.

Q. Were y'all shooting baskets with them?

A. No.

Q. Were you listening to music?

A. No.

Q. O.K.

Appendix pages 68-69 [tr. Pages 39-40]

This is critical testimony. It is critical testimony from a witness who was present at the petitioner's trial and available to be called. Amanda's testimony demonstrates that Tiffany had no plan, and more importantly, the four boys approached them! The State's entire theory of the case was based on speculation that because Tiffany knew Sean Kammerer was lying in wait for Jesse Hamm, that she delivered the victim to the scene of his death. However, there is not a scintilla of direct evidence of such a plan in the record, and Amanda Fender, who the State concedes is blameless and who is unimpeachable—except as being related to the defendant—was present every second of the tragic night that led to the death of Jessie Hamm. It is particularly disturbing that the defense did not call this witness, and the failure to do so is a demonstrable deviation from the minimum standard of practice. The failure to call Amanda critically

prejudiced the defendant, especially since Amanda confirms—just as Officer Hans saw—that Tiffany was not present at the time of the shooting:

Q. Okay. When you got to the Publix, did anybody get out of the car?

A. Kevin. He was real –he was real – like he knew something. He was like, let me out, let me out, you know. And then Jesse got out, and he said drive. So we left.

Q. You left?

A. Yes, sir.

Q. Where were you sitting then?

A. I was still in the back seat.

Q. Okay. And where did you drive or where did Tiffany drive?

A. We went past the churches and that's when we heard, you know, I guess shots, and I didn't know quite what it was, you know?

Q. All right. How far away from the boys were you when you heard those noises?

A. I know it was pretty – you know, it's pretty far because from the Publix to the Catholic church is like – I would say maybe a mile or two. It's that far away.

Q. All right. When the boys were in the car, did you see any guns?

A. No, sir.

Q. Did you hear them talk about any guns?

A. No, sir.

Q. Where did you go after you left; after you heard the noises where did you go?

A. We went to Brandon's house.

(Appendix at pages 71-72 [tr. 42-43])

This is critical testimony because it demonstrates the lack of a plan and the fact that Tiffany went back to Brandon's house. The State elicited the most crucial information on page 80 of the Appendix [tr. Page 51] when the State asked Amanda if she was aware of everything going on that night:

Q. Could you hear everything that was going on?

A. I know that Jesse got the phone from Tiffany and then after he got off the phone he said to take me up to Publix. So him and Kevin got in the car with us. Because we said were going to go home.

Even the State will concede this is crucial testimony. While it is exclusively the jury's province to choose how much to believe of any witness' testimony, it is indisputable that this is critical testimony, for it demonstrates that Tiffany took Jesse to Publix at his direction, rather than Tiffany having a plan to drive him there. If the jury had heard this testimony, it could acquit the appellant of the accessory charge **and** the murder charge, but the jury never had an opportunity to evaluate Amanda's credibility because petitioner's counsel failed to call her even though she was present in the courtroom. Moreover, all trial lawyers know that the failure to call an available witness leads to an adverse inference. See *Davis v. Sparks*, 235 S.C. 326, 111 S.E.2d 545 (1959): "Inference from the unexplained failure of a party to call an available witness that the testimony of such witness would have been unfavorable may be drawn only where, under all of the circumstances of the case, the failure to produce such witness

creates suspicion of a willful attempt to withhold competent testimony. Such suspicion is generally held not warranted where the material facts assumed to be within the knowledge of the absent witness have been testified to by other qualified witnesses.” Amanda could have testified to facts that no other witness knew, especially in the critical moments leading up to the coincidental meeting with the four boys. The jury knew Amanda was on the scene, and thus it became critical to call her. While the trial court correctly charged the jury that the failure to call the defendant cannot be considered, this charge says nothing about failing to call eyewitnesses. Stated another way, it is impossible to build an alibi defense without taking some step to prove the alibi. Thus, the decision falls below the standard of practice, and the resulting prejudice to the appellant cannot be overstated. The State’s entire case against Tiffany Sanders is built on inferences that are supported only by speculation. The State’s eyewitness to the shooting, Officer Hans, testified that she saw only one vehicle—Sean’s Jeep Cherokee. Thus, Amanda Fender’s testimony would have been corroborated by the State’s eyewitness. Thus the failure to call Amanda or make any effort to amplify Officer Hans’ testimony doomed any chance of a defense and fell below the objective standard.

Argument III.

Trial Counsel deviated from the minimum standard of care in failing to cross-examine the one unbiased eyewitness to the crime. As the record on appeal

demonstrates, Officer Hans testified from pages 193 to 198, and, as quoted above, testified that she was an eyewitness to the shooting and saw the perpetrators flee in a Jeep Cherokee. It is a rare murder scene that includes an eyewitness, who at the time of her testimony, wore the uniform of a police officer. There is no doubt that the police officer's testimony was favorable to Tiffany Sanders because, as quoted above, she established beyond any question, that at the time of the shooting, Tiffany Sanders was not present. Thus there was no need to cross-examine the witness for purposes of impeachment, but the failure to examine her to reinforce the testimony she gave in direct was not only a critical blow to the defense, but also a clear deviation from the minimum standard of effective representation. Even a cursory cross-examination would amplify the officer's ability to see and hear the events at the exact moment Sean Kammerer was committing the offense and reinforce the point that the only vehicle in the vicinity at the time of the shoot was Sean Kammerer's Jeep Cherokee. The availability of Officer Hans to the defense was the most critical piece of the defense's theory of the case and would have paved the way to present Amanda Fender as the only other eyewitness to the events leading up to the crime. This is not a case in which the evidence of guilt is so overwhelming that counsel's failure to follow up on Officer Han's testimony is harmless. "An error 'is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained. Thus, an insubstantial error not affecting the result of the trial is harmless where guilty has been conclusively proven by competent evidence such that no other rational conclusion can be reached.'" *State v. Martin*, ___ S.C. ___, ___ S.E.2d. ___ (Ct. App. 2013, Opinion No. 5125) The evidence leading to the conviction of Tiffany Sanders is non-existent, being premised

only up inferences and speculation. Therefore, her lawyer's failure to follow up and amplify the evidence of her innocence offered by the State resulted in extreme prejudice to her defense and prevented her from receiving a fair trial.

The lower court brushed off this failure by rationalizing that “nature and scope of cross-examination is inherently a matter of trial tactics.” (Order at page 8, Appendix at page 24). This is a correct statement of law, with which the petitioner has no quarrel. However, where the undisputed evidence in the record is that the eyewitness **saw** the murder and saw the participants, the failure to cross-exam her to emphasize this crucial point is well below the standard of care for effective representation. The P.C.R. court missed the legal issue. The Order under review recites: “Applicant failed to present Hans as a witness at the post-conviction relief hearing to establish whether beneficial information could have been elicited other than that obvious from a review of Hans’ testimony on direct examination.” (Order at page 8-9, pages 24-25 of Appendix) This is a correct statement of law and a correct statement of fact, but it misses the essential point of the petitioner’s application. Officer Hans’s testimony was crucial to the elements of the petitioner’s defense of murder. She was not present. Officer Hans’s testimony demonstrates that at the time of the murder, the petitioner was not present. At the post-conviction relief hearing, the petitioner did not need more evidence from Officer Hans—all she needed to demonstrate was that her trial counsel failed to follow up with a single cross-examination question that amplified and emphasized the Officer’s critical defense testimony. As the trial transcript makes clear, Officer Hans offered the petitioner an alibi, and her trial counsel did not ask a single question to follow up or amplify. This failure is the deficient performance that

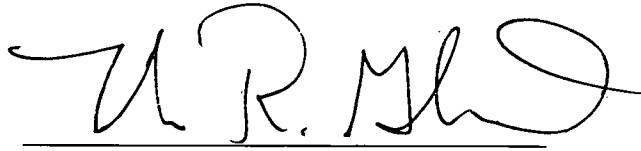
prejudiced the petitioner and prevented her from receiving anything close to a fair trial. The jury convicted the petitioner of murder despite Officer Hans establishing she was not present. Therefore, she was critically prejudiced by her counsel's failure to amplify and augment Officer Han's testimony.

CONCLUSION

In summary, it is impossible to look at the petitioner's trial counsel's failings and see them as anything other than a failure to conform to the minimum standard for competent and effective representation. In short, the petitioner was denied any meaningful opportunity to mount a defense and thereby deprived of her constitutional right to counsel. As may be seen by reference to the trial transcript being filed in the direct appeal filed simultaneously with this Petition for Certiorari, the State had insufficient evidence to get to a jury. With anything approaching a competent defense, the trial judge would have been more likely to grant a directed verdict, at least on the charge of murder. Instead, despite a record devoid of any evidence that the petitioner was present at the scene of the shooting at the time of the shooting, the trial court not only refused to grant a directed verdict, but also a jury convicted her of murder on the thinnest of evidence. It is impossible to look at the thin evidence in this case combined with the deficient performance of counsel and conclude anything other than this case represents a miscarriage of justice. For these reasons, this Court should vacate the sentence and remand the case for trial so that the petitioner can receive the benefit of a competent defense.

Respectfully submitted,

December 27, 2013

A handwritten signature in black ink, appearing to read "D. T. Cobb", written over a horizontal line.

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